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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 111

GUSTANES ANCKER, ROYAL W. ARMSTRONG, FRED M. BARTLETT, ET AL.,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT IN AND FOR THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, Gustanes Ancker, Royal W. Armstrong, Fred M. Bartlett, William E. Bloom, Jack Brooks, Alvin C. Burke, Harold Curry, Nancy Curry, Lester Steve Czanik, Henry A. Davidson, George Allen DeWitt, David Fisher, Bernard Flyman, Martin E. Fortson, Emil Freed, John Gibson, James Grace, Ernest Grant, Lester S. Greenberg, Fred Hainline, Edwin Hale, John Hansen, Charles Hart-

man, Stanley Hasrato, Edward M. Havens, Orvin Johnson, Thomas Jones, Stanley Joslin, James Kane, Sam Kowal, Walter Kelly, Sheldon Kelsey, Rudolph Kern, Dan Elby, and Henry Klette, pray that a writ of certiorari issue to review a decision and judgments of the Appellate Department of the Superior Court in and for the County of Los Angeles, State of California, rendered on December 29, 1947 (R. 107-119, 125-126), which affirmed in part certain judgments and orders of the Municipal Court of the City of Los Angeles under which petitioners stand severally convicted of a misdemeanor (R. 973-979) for violating Section 166(4) of the Penal Code of the State of California (Deering, Penal Code of California, 1937, p. 56). Petition for Rehearing was denied on January 22, 1948 (R. 125).

Opinion Below

The opinion of the Appellate Department of the Superior Court in and for the County of Los Angeles, State of California, has not yet been officially reported. It appears in the record at R. 107-120.

Statement of Matter Involved

The 35 petitioners, together with 90 others, were charged in a single complaint containing 4 separate counts charging misdemeanors, all based on the picketing by petitioners of the studios of the Columbia Pictures Corporation in Los Angeles on the morning of November 16, 1946 (R. 1-10).

The petitioners and 6 others were tried en masse. They were convicted of violating Count I and II of the complaint (R. 973-979). The Appellate Department of the Superior Court reversed the convictions on Count I and allowed the convictions under Count II to stand. The petitioners seek review herein of said convictions under Count II of the complaint.

Count II of the complaint charged the petitioners with the commission of a misdemeanor, a violation of Section 166(4) of the Penal Code of the State of California in that the petitioners "did wilfully and unlawfully and knowingly —at a place of business of the Columbia Pictures Corporation—disobey a lawful order * of the Superior Court of the State of California in and for the County of Los Angeles"—in that each of them—"disobeyed certain provisions" of an *ex parte* restraining order issued out of that court (R. 4-6).

Count II of the complaint contained *verbatim* 5 paragraphs or sections of the restraining order (Paragraphs 1, 2, 4, 5, 11). Paragraphs 1, 2 and 4 were sweeping in scope and enjoined conduct in such familiar and constitutionally prohibited terms as "intimidating," "threatening," "molesting," "coercing" and "obstructing." Paragraphs 5 and 11 arbitrarily purported to limit the number of pickets around and in the vicinity of the plaintiff's place of business in terms which were conflicting and physically impossible to comply with.

The restraining order alleged to have been disobeyed by the petitioners was contained in a 10-line paragraph attached to an order to show cause of 6 typewritten pages which contained 11 numbered paragraphs of restraints which were prayed for, several being prayed for in the alternative. The restraining order did not set forth the restraining provisions in *haec verbae* but incorporated them merely by referring by number to certain paragraphs of the order to show cause (See Appendix p. 29).

Each paragraph of the restraining order alleged to have been violated by the petitioners contained disjunctive provisions. The complaint upon which petitioners were con-

* The restraining order and the order to show cause of which it was a part are set forth in the Appendix to this Petition (p. 22).

victed charged the violations of certain sections of the restraining order in similar disjunctive fashion, thus, in effect, charging each petitioner with criminal conduct described in a series of alternatives. The complaint was wholly silent as to any *acts* committed by any of the petitioners upon which the alleged violations of the several paragraphs of the restraining order were predicated.

When the case was called for trial, February 4, 1947, counsel for the then 125 defendants, including all of the petitioners, moved for an order severing the then 125 defendants into groups small enough to guarantee to the defendants all the elements of a fair trial under the State and United States Constitutions (R. 129-131).

In response to that motion the court selected and severed the trial of the 35 petitioners, together with six other persons (whose cases never reached the jury) and ordered a trial as to these 41 defendants, over objection of defendants' counsel (R. 131).

On the next court day, February 6, 1947, and under the then existing physical circumstances (R. 92), and with knowledge of the number of defendants assigned for joint trial, counsel for petitioners undertook to make a motion for further severance. The court refused to entertain such motion, to hear evidence thereon, or to permit counsel for petitioners to make an offer of proof in support thereof (R. 134-135).

On denial of the aforesaid motion, the Municipal Court proceeded to trial on said February 6, 1946, against the 35 petitioners herein, together with six other persons and after verdict by the jury the trial court imposed the sentences and orders ranging from one year in jail to two years summary probation, to which was added fines aggregating $9650.00 (R. 975-979).

The temporary restraining order involved herein was issued *ex parte* on the 9th day of October, 1946 (People's Exhibit L, R. 211-213, set forth in appendix), and by three successive minute orders was continued in effect until the 19th day of November, 1946 (People's Exhibit N, R. 270-271). There was no evidence before the Trial Court whatsoever as to what, if any, facts were presented to the issuing court. Neither the complaint nor supporting affidavits were introduced, and the order itself fails to recite any jurisdictional facts whatsoever. The orders of continuance recited no facts nor was any evidence introduced to show their justification.

As to 25 of your petitioners, who did not take the stand, the record discloses that whatever knowledge they had, concerning the contents of the order, was communicated to them by a single broadcast (R. 248, 282), under noisy conditions (R. 255-257), over a loud-speaker system (R. 211-213) to the picket line, of which they were members, by an unseen police officer reading it, word for word, as it appears in People's Exhibit L, including all of the John Does and all of the prohibitory paragraphs, including paragraphs 8, 9 and 10, which were not granted by the court, and paragraphs 3, 6 and 7, with the violations of which petitioners were not charged (R. 277, 282). This broadcast was of 17 minutes duration (R. 219).

The trial court, in respect to Count II, instructed the jury that it should convict petitioners if it found that they had violated any one or more of the five paragraphs of the order as charged in the complaint, or any part thereof (R. 40-41).

Each of the 35 verdicts of the jury finding Petitioners severally guilty of Count II was general (R. 973).

Statement as to Jurisdiction

The final judgment of the Appellate Department was entered December 29, 1947 (R. 107-119, 125-126); and petition for rehearing was denied on January 22, 1948 (R. 125). On April 13, 1948, Mr. Justice Douglas signed an order extending the time for filing a petition for a writ of certiorari in the above entitled cause to and including June 21, 1948 (R. 983). The Appellate Department is the highest court in the state of California to which petitioners under the California law might appeal their case. California Constitution, Art. VI, Secs. 4, 4b and 5; *Edwards* v. *California*, 314 U. S. 160; *Carlson* v. *California*, 310 U. S. 106; *Portnoy* v. *Superior Ct.*, 20 Cal. (2) 375, 125 P. (2) 487. The jurisdiction of this Court is invoked under Sec. 237b of the Judicial Code, as amended (28 U. S. C. 344 (b)).

In the proceedings below the petitioners specially set up and claimed that their conviction under Count II of the complaint infringed upon their rights and privileges under the Constitution of the United States and particularly under the First and Fourteenth Amendments thereof.

The Federal questions sought to be reviewed by the petitioners were raised and considered in the Courts of California as follows:

A. The denial of free speech and assembly by undue restraints on picketing contained in the restraining order, upon which Count II of the complaint was predicated, was raised as a violation of the petitioner's rights under the First and Fourteeth Amendments, in the first instance by demurrer (R. 10, 12-13) which was overruled (R. 930); in the Statement on Appeal, Grounds #'s (8), (24), (25), (R. 96, 100-101); and in the Petition for Rehearing (R. 120-124). The Appellate Department of the Superior Court considered petitioners' claim of unconstitutionality (R. 113-115), held Paragraph 11 of the restraining order valid but deemed it

unnecessary to pass upon the remaining paragraphs of the restraining order (R. 113-114). The Appellate Department found that the record was bare of any showing that "proper circumstances existed" for the restraints on picketing and held that "in the absence of any evidence to the contrary" there was a presumption that a "factual foundation" for the order existed (R. 114). The Appellate Department recognized however, in considering Count I, that picketing was "constitutionally protected as a legitimate means of conveying ideas" and that it "may not be forbidden on the ground that, incidentally, it blocks and hinders those who would enter the place picketed" (R. 111), thus recognizing the complete constitutional invalidity of Paragraph 4 of the restraining order (contained in Count II) which restrained "obstruction" merely (See Appendix p. 26), but refusing at the same time to pass upon the same (R. 113-114).

B. The vagueness of the restraining order and of Count II of the complaint, which was predicated thereon as being repugnant to the due process clause of the Fourteenth Amendment, was raised in the first instance by demurrer (R. 12-13) which was overruled (R. 930); and in the Statement on Appeal, Grounds (1) and (26) (R. 95, 101). The Appellate Department of the Superior Court did not pass directly on this claim but found, however, that the provisions of the restraining order contained in Count II of the complaint were "varied and in part conflicting", that the defendants and police officers who testified were "vague as to the details of the order"; that "little imagination was used in its drafting to make it readily grasped when broadcast" (R. 117).

C. Petitioners claimed as a violation of due process under the Fourteenth Amendment that the jury, instructed by the court that a verdict of guilty could be rendered if peti-

tioners were found to have violated *any one* of the paragraphs of the restraining order, did return a general verdict of guilty upon that count which contained one or more of the provisions of the restraining order which were unconstitutional because of vagueness and undue restrictions on picketing (Petition for Rehearing, Paragraph A, R. 120-122). The Appellate Department inferentially had ruled adversely on this claim by the holding in its memorandum opinion that the legal sufficiency of *one* of the paragraphs of the restraining order set forth in Count II of the complaint was adequate to justify the general verdict of guilty returned on that count (R. 113-114), and ruled directly on that point by its denial of the petition for rehearing (R. 125).

D. After the trial court had severed the trial of the 125 defendants named in the complaint, leaving 41 defendants including all of the petitioners to be jointly tried (R. 131), petitioners attempted to make a further motion for severance but their counsel was not allowed to proceed with his motion, nor to state his grounds therefor, nor to lay a factual foundation to support it (R. 133-135). The constitutional claim of lack of due process was specifically made, however, in the Statement of Appeal (R. 91-92) and in the Grounds of Appeal (R. 96) and in the Petition for Rehearing (R. 124). The Appellate Department in its memorandum opinion considered this claim but held that the prior motion to sever which resulted in the first severance precluded any further motion on that subject, holding that, though petitioners were "inconvenienced" (R. 109), "none were legally prejudiced by the compromise that had to be made between the State's interest and that of the defendants" (id.); no error was found by the Appellate Department in the refusal to receive evidence or an offer of proof in support of the claim of invasion of constitutional right which counsel sought to advance then and later did.

Statute and Restraining Order Involved

1. Section 166(4) of the Penal Code of the State of California (Deering, Penal Code of California, 1937, p. 56):

> Section 166. *Criminal Contempts.* Every person guilty of any contempt of court, of either of the following kinds, is guilty of a misdemeanor:
>
> * * * * * * *
>
> 4. Wilful disobedience of any process or order lawfully issued by any court;

2. The restraining order of the Superior Court of the State of California in and for the County of Los Angeles appears in the Order to Show Cause set forth in the Appendix to this petition (p. 29).

Questions Presented

1. Were petitioners denied freedom of speech and assembly guaranteed by the Fourteenth Amendment by the undue restraints on picketing contained in a restraining order issued *ex parte* upon which Count II of the complaint was predicated and under which they were convicted of a misdemeanor?

2. Were the defendants deprived of due process of law under the Fourteenth Amendment by conviction on a complaint charging as a misdemeanor the violation of a restraining order restricting picketing in a trial in which no evidence of any acts constitutionally justifying such restraint was offered in behalf of the People?

3. Were the petitioners denied due process of law in violation of the Fourteenth Amendment by their conviction on a complaint, vague in itself and containing charges in the disjunctive and no allegation of any acts committed by the petitioners, and which was predicated on a restraining

order too vague, ambiguous and uncertain to inform petitioners of the nature of the accusation against them and to protect them against double jeopardy?

4. Where one or more of the paragraphs of an *ex parte* restraining order were void because they imposed unconstitutional restrictions upon picketing and where the verdict of guilty was general after an instruction that the jury should convict if they found petitioners had violated any one provision of any one paragraph of the restraining order, were petitioners denied due process of law as guaranteed by the Fourteenth Amendment under the doctrine of *Stromberg* v. *California* (1931) 283 U. S. 359?

5. Were petitioners denied due process of law in violation of the Fourteenth Amendment to the United States Constitution when over objection they were compelled to stand trial *en masse* in a group of 41 defendants on a misdemeanor complaint containing 4 separate and distinct counts against each defendant, the second count containing five separate specifications of criminal conduct divided in turn into numerous provisions pleaded in the disjunctive (all aggregating hundreds of separate charges) which were tried and considered by a jury over a period of 2 months and which resulted in 140 separate verdicts?

6. Were petitioners denied due process in violation of the Fourteenth Amendment by the refusal of the trial court to hear a motion for further severance and to accept evidence or a proffer of proof or facts proffered to establish the constitutional right to such severance?

Reasons Relied On for Allowance of the Writ

This case arises out of a labor dispute in the motion picture industry which involved thousands of persons. Not only petitioners, but hundreds of other persons were ar-

rested and tried on charges similar to those which are the subject of this petition. The combined use of sweeping *ex parte* injunctions and of the Penal Law of California in vague complaints (alleging no facts) tried out in mass trials with consequent disregard of constitutional safeguards and under oppressive burdens of trial and appeal by defendants, tends to re-establish as a pattern for the resolution of industrial disputes the coercive methods which were prevalent in the years before 1932. It is of the greatest importance that the fundamental rights guaranteed by the Fourteenth Amendment be reasserted in this case in accord with the applicable decisions of this Court to the end that there be no abridgement by excessive and over-zealous use of state power, of the exercise of individual and collective expression and action in labor disputes in the area which this Court time and again has ruled to be within the protection of the Fourteenth Amendment.

I

A. The decision of the Appellate Department of the Superior Court refusing to consider the claim of unconstitutionality of paragraphs 1, 2, 4 and 5 of the restraining order contained in Count II of the complaint upon which petitioners were convicted, at least one of said paragraphs being void on its face for vagueness and for limitations on the exercise of speech, assembly and peaceful picketing by petitioners, is not in accord with the applicable decisions of this Court.

Paragraphs 1 and 2 of the restraining order enjoined all picketing which had as its purpose "intimidating", "threatening", "molesting" or "coercing" of various categories of persons in relations with plaintiff company and all who sought entrance to plaintiff's places of business. That this type of language includes in its ambit picketing which is peaceful and which may not be constitutionally enjoined

is recognized by the State of California. "It is too firmly established to merit much more than the mere enumeration of the fact that not all conduct embracing or effecting compulsion, coercion, intimidation, threats and menace is unlawful"—*In re Porterfield* (1946) 28 Cal. (2d) 91, 168 P. (2d) 706.

Paragraph 4 of the restraining order in effect prohibits picketing by enjoining the "obstruction • • • from ingress or egress into and out of plaintiff's places of business by walking, marching or standing in groups or in any other manner"—no matter how peaceful the intent and how incidental the obstruction.

The Appellate Department in its decision in this case declared the law of the State of California to be that the constitutional protection of picketing is not forfeited merely because such picketing "incidentally • • • blocks and hinders those who would enter the place being picketed"• (R. 111). Thus it has been authoritatively held by the State of California that the term "obstruction" includes in its scope constitutionally protected action as well as action which might be subject to penal sanctions.

Paragraph 5 of the restraining order enjoined "standing, marching or walking in groups or columns" before the entrances of the plaintiff's places of business in such manner as to leave not less than 25 feet of space "between adjacent elements of such groups or columns" before vehicular entrances and 15 feet before entrances used solely for pedestrian traffic. Paragraph 11, however, seemingly permits as many as 8 pickets in front of vehicular entrances and as many as 4 pickets in front of pedestrian entrances. Obvioulsy, to station the number of pickets permitted by paragraph 11 either at vehicular or pedestrian entrances would

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•Citing: *In re Blaney* (1947), 30 A. C. 648, 652; *Pezold* v. *Amalgamated, etc., Workmen* (1942), 54 Cal. App. (2d) 120, 126.

violate the provisions as to distances between pickets required by paragraph 5, and certainly, would lead to the "obstruction", albeit unintentional, prohibited by paragraph 4 of the restraining order.

The Appellate Department recognized the vagueness and uncertainty inherent in those restraining paragraphs by finding that the provisions thereof were "conflicting and varied" and that petitioners as well as police officers who testified quite understandably were "vague as to the details of the order", • • • "for little imagination was used in its drafting to make it readily grasped when broadcast" (R. 117). The Appellate Department failed, however, to draw the conclusion required by the Fourteenth Amendment that the paragraphs of the restraining order were void and that their use as a basis for a criminal proceeding violated due process.

The restraining paragraphs are drawn in the tradition of the sweeping injunctions of another era and stand condemned by this Court in *Thornhill* v. *Alabama* (1939), 310 U. S. 88; and in the picketing cases which followed; *Milkwagon Drivers' Union* v. *Meadowmoor Dairies, Inc.*, (1941), 321 U. S. 287; *AFL* v. *Swing* (1941), 312 U. S. 312; *Carlson* v. *California* (1939), 310 U. S. 106.

The restraining order is not "narrowly drawn" to cope with specific evils of which there may have been imminent danger; *Thornhill* v. *Alabama, supra;* Cf. *Saia* v. *New York,* — U. S. —, 68 S. Ct. Ref. 1148. Nor does it define the limitations upon "normally free conduct" in the "clear and guarded language" held by this Court to be appropriate in "the exceptional cases warranting restraint" of picketing; *Milkwagon Drivers' Union* v. *Meadowmoor Dairies, Inc., supra.* This case, therefore, calls for the application of the well-established rule recently reiterated by this Court that it will readily strike down language as ambiguous and uncertain when the puni-

tive action it evokes is "entwined with limitation on free expression"; *Winters* v. *New York* (1948), 333 U. S. 507; *Stromberg* v. *California, supra; Herndon* v. *Lowry* (1937), 301 U. S. 242, 258; *Thomas* v. *Collins* (1945), 323 U. S. 516.

Aside from the unconstitutional limitation on speech contained in the broad and uncertain language of the several paragraphs of the restraining order, these paragraphs embedded in Count II of the complaint as the criteria of criminal guilt set up no ascertainable standards of prohibited conduct, thus violating the due process guarantees of the Fourteenth Amendment; *Thornhill* v. *Alabama, supra; Lanzetta* v. *New Jersey* (1939), 306 U. S. 451, 453; *Connally* v. *General Construction Co.,* (1926), 269 U. S. 385; *United States* v. *Cohen Grocery Co.,* (1921), 255 U. S. 81; *M. Kraus & Bros.* v. *United States* (1946), 327 U. S. 614; *Winters* v. *New York, supra.* The constitutional vice of vagueness which necessarily taints the complaint as well as the provisions of the restraining order is enhanced in the complaint itself by the fact that no *act* committed by any of the 41 defendants is set forth to indicate which of the multiple provisions of the restraining paragraphs were violated and in what manner; *United States* v. *Cruikshank* (1876), 23 L. Ed. 588; *Evans* v. *United States,* 153 U. S. 584; *United States* v. *Hess,* 124 U. S. 483; *United States* v. *Carll,* 105 U. S. 611; *Cole* v. *Arkansas,* 333 *U. S.* 196; and by the further fact that many of the provisions of each paragraph of the restraining order are pleaded in the disjunctive; *for example,* each petitioner is charged with obstructing (without any particularity) employees, customers *or* tenants *or* other persons (without naming or describing them) from ingress and egress into and out of plaintiff's *places* of business (without naming which place, or at which of the numerous entrances described in paragraph 11 of the restraining order, the "obstruction" took place) by walking, marching *or* standing in groups *or in any other manner* (without any

specification whatever). Such pleading in a criminal case gives no notice of the nature of the accusation, gives no opportunity to prepare a defense, and gives no protection against double jeopardy—thus violating due process; *United States* v. *Clarke,* 20 Wall. 92, 87 U. S. 92.

The vagueness which permeated the restraining order and complaint was further enhanced by the vagueness in understanding of the terms of the restraining order found by the Appellate Department to have existed among petitioners (R. 117). This vagueness of understanding necessarily flowed from the method of communicating the restraining order by reading it over a loudspeaker in the vicinity of the picket line as a ten-line appendage of an order to show cause six pages in length, and referring to the restraints merely by paragraph number as they had been numbered in the order to show cause which had previously been blared out of the loudspeaker.

B. The Appellate Department of the Superior Court in holding that paragraph 11 of the restraining order limiting the number of pickets was constitutionally valid, in the absence of any showing of facts justifying such restraint in the record, decided a question not heretofore decided by this Court and probably not in accord with applicable decisions of this Court.

The restraining order was issued *ex parte* as part of an order to show cause. Neither the order to show cause nor the restraining order itself alleged any facts in justification of the arbitrary limitation of pickets at various places of ingress and egress and on the highway near the plaintiff's places of business, to numbers ranging from two to twenty-five. Nor did the People offer as evidence the complaint and supporting affidavits, if any, on which the Superior Court of Los Angeles County had acted in issuing the *ex parte* restraining order, although section 166(4) of the California

Penal Code requires as an element of the offense that the order disobeyed must be a "lawfully issued" one. (The absence of this evidence was described by the Appellate Department as due to "some queer quirk"—R. 114-115.)

The Appellate Department in its opinion adverted to the doctrine of the *Meadowmoor case, supra,* as allowing limitation of pickets under certain circumstances. It found, too, that there was no proof in the record that such "proper circumstances existed" (R. 114). But that Court avoided its plain duty to reverse the convictions both under the requirements of section 166(4) and under the *Meadowmoor* doctrine by adopting the presumption "that there was a factual foundation for the order" (id.). The use of a presumption of factual basis, particularly in connection with an *ex parte* restraint used as a basis for a criminal prosecution, is a frustration of the *Meadowmoor* doctrine and makes possible the very type of restraint which the *Meadowmoor* doctrine intended to prohibit. The *Meadowmoor* doctrine, as applied by the Appellate Department precludes the "search of the record" by a reviewing state court or by this Court for the factual basis required under that doctrine to justify picketing restraints. The decision of the Appellate Department paves the way for restraints based on "insubstantial findings of fact screening reality", or based on no findings of fact whatsoever. Lack of due process further is manifest in the use of the presumption in that it obviated the necessity of proof of an essential element of the offense and thus deprived petitioners of the presumption of innocence.*

* The ruling in the case of *United States* v. *United Mine Workers of America,* 330 U. S. 258, to the effect that an injunction must be obeyed until reversed, however erroneous it may be, has no applicability in this case for the following reasons: The petitioners were not tried for contempt of court; they were tried on a criminal charge founded on a section of the Penal Code of California; the misdemeanor defined in Section

II

The refusal of the Appellate Department of the Superior Court to pass upon the constitutional validity of paragraphs 1, 2, 4 and 5 of the restraining order set forth in Count II of the complaint, upon which petitioners were severally found guilty in general verdicts, is not in accord with the applicable decisions of this Court in view of the constitutional invalidity of one or more of said paragraphs for vagueness and restraints which encroach upon conduct protected by the Fourteenth Amendment. Under "I" hereof it has been established that paragraphs 1, 2, and 4 of the restraining order each in themselves were unconstitutional for vagueness and excessive limitation on picketing, that paragraphs 5 and 11 were unconstitutional for the arbitrary limitation on picketing and that all paragraphs taken together were unconstitutional for vagueness and uncertainty because of conflicting provisions.

Assuming *arguendo* that paragraph 11 was valid as the Appellate Department of the Superior Court found, the general verdicts returned by the jury violate due process of law. The trial court charged the jury that a petitioner could be found guilty if there was disobedience "of any one" of the paragraphs of the restraining order or of "a provision of any one of the paragraphs" (R. 40-41).

On the assumption that the verdicts of guilty would stand if only one paragraph of the restraining order was valid, the Court held paragraph 11 to be so, deeming it unnecessary "to determine whether or not any other provisions were enforceable".

166(4) has as one of its elements the requirement that the disobeyed order be "lawfully issued," thus placing directly in issue the validity of the restraining order; under the law of California a constitutionally invalid injunction may be violated with impunity; *Fortenbury* v. *Supreme Court* (1940) 16 Cal. (2d) 405, 106 P. (2d) 411.

This assumption by the Court is directly *contra* to the holding of the *Stromberg* case, *supra,* in which the conviction was reversed because at least *one* of several counts of an indictment was void under the Fourteenth Amendment. Here, each of the paragraphs taken individually and together are void. The lack of due process is manifest; *Williams* v. *North Carolina* (1942), 317 U. S. 287.

III

A. The petition seeks review of the special and important question of the extent of the limitations required by the due process clause of the Fourteenth Amendment on mass criminal trials in state courts—a question over which this Court has expressed grave concern; *Kotteakos* v. *United States* (1945), 328 U. S. 750. The Appellate Department of the Superior Court of California in upholding the refusal of the trial court to sever trial of petitioners in the face of constitutional objections decided a phase of this question not heretofore decided by this Court and probably not in accord with the applicable principles of the *Kotteakos* case, *supra.* In that case, this Court recognized that conditions created by a mass trial constituted lack of due process. Thirty-two defendants on eight charges of conspiracy were involved. Nineteen went to trial and the jury finally considered the guilt of only 13. This Court recognized that neither convenience nor efficiency in prosecution are reasons per se justifying mass trials—and that such trials are inherently dangerous to individual rights. Cf. *United States* v. *Central Supply Association* (E.D. Ohio, 1947), 6 F.R.D. 526.

In the present case the complaint was not founded on conspiracy, but each defendant was charged and severally tried, though in mass, witness the 140 separate verdicts (R. 973-979).

Under the Court's charge, *supra*, the jury in this case had to consider separately as to each defendant not only Counts I, III and IV, and the 5 paragraphs of Count II, but also the numerous separate provisions of each of said paragraphs. Without considering these separate provisions each defendant was charged 8 times. If the separate provisions are considered each defendant was charged no less than 20 times. The jury therefore would have had no inconsiderable difficulty in determining the guilt of *one* defendant on the complaint before it. But the jury was actually obliged to consider the guilt or innocence of 41 defendants on a total of not less than 328 specific charges considering the Counts of the complaints and paragraphs of the restraining order alone, and possibly more than 820 charges of separate offenses if the separate provisions of the restraining order are also considered.

Each of the petitioners instead of facing a trial of one or two days at most, was obliged to attend court over a two months' period in which numerous witnesses took the stand, numerous exhibits were introduced and approximately 1500 pages of testimony were taken. This mass trial by its very nature and extent deprived the petitioners of due process in violation of the Fourteenth Amendment. True, the Appellate Department found that the petitioners "were inconvenienced". But inconvenience aside, whether it be financial, the burden of appeal, or the time lost in court, the mass trial denied due process. It was impossible to escape the inherent difficulty of effective consultation with counsel. It was impossible for the court to "scrupulously safeguard each defendant individually . . . from loss of identity in the mass" (*Kotteakos* case, *supra*, 776). It was impossible to avoid guilt by association. The conclusion is unavoidable that as a matter of law the jury could not possibly have given such consideration to all of the

petitioners on each of the charges and as to all of the evidence as to each petitioner as is required to establish guilt beyond a reasonable doubt.

As this Court pointed out in the *Kotteakos* case, the "possibility for miscarriage of justice becomes greater and greater" as the number of defendants and number of charges increase. Here the limits allowed by due process were clearly exceeded.

The Appellate Department upheld the Trial Court's ruling that a previous severance of defendants under the complaint here under consideration, which reduced the number of defendants from 125 to 41, precluded a further motion for additional severance. Counsel for the petitioners attempted to make such motion but was stopped by the court (R. 134-135). The fact is that after the severance had reduced the defendants to 41, the petitioners continued their objection to a mass trial and sought to reduce the number still lower. Over their objection, they were compelled to proceed.

B. The Trial Court refused to receive testimony or an offer of proof on the facts which counsel desired to elicit to support the constitutional basis for the second motion for severance. Thus petitioners were deprived of establishing the factual basis upon which they would have been predicated, their claim advanced on appeal that the mass trial would have deprived them of the *effective* use of counsel and of an *effective* jury trial. This refusal to hear facts to support a constitutional objection was in itself a lack of due process; Cf. *Snowden* v. *Hughes* (1944), 321 U. S. 1, 8-9; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 548.

Conclusion

The writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners.

APPENDIX

Order to Show Cause and Restraining Order Upon Which Count II of the Complaint Was Based

In the Superior Court of the State of California in and for the County of Los Angeles.

Columbia Pictures Corporation, a corporation, Plaintiff, v. Local No. 946 of the United Brotherhood of Carpenters and Joiners of America, an unincorporated voluntary association; Jim Skelton, individually and as business agent of said last named association; Roe One and Roe Two, individually and as President and Secretary respectively of said last named association; Doe One to Doe Two Hundred and Fifty (inclusive as to all intervening numbers as though each said Doe was severally and separately designated) individually and (each of them) as members of said last named association; Painters Local No. 644 of the International Brotherhood of Painters, Decorators and Paperhangers of America, an unincorporated voluntary association; Herbert K. Sorrell, individually and as business agent of said last named association; Roe Three and Roe Four, individually and as President and Secretary respectively of said last named association; Doe Two Hundred and Fifty-one to Five Hundred (inclusive as to all intervening numbers as though each said Doe was severally and separately designated), individually and (each of them) as members of said last named association; Cinema Lodge No. 1185 of the International Association of Machinists, an unincorporated voluntary association; J. R. Stehr, individually and as business agent of said last named association; Roe Five and Roe Six, individually and as President and Secretary respectively of said last named association; Doe Five Hundred and One to Seven Hundred and Fifty (inclusive as to all intervening numbers as though each said Doe was severally and separately designated) individually and (each of them) as members of said last named association; Local No. 40 of the International Brotherhood of Electrical Workers, an unincorporated voluntary association; Roy Tyndall, individually and as business agent of said last named association; Roe Seven and Roe Eight,

individually and as President and Secretary respectively of said last named association; Doe Seven Hundred and Fifty One to One Thousand (inclusive as to all intervening numbers as though each said Doe was severally and separately designated), individually and (each of them) as members of said last named association; Local No. 278 of the Building Service Employees International Union, an unincorporated voluntary association; Jack Williams, individually and as business agent of said last named association; Roe Nine and Roe Ten, individually and as President and Secretary respectively of said last named association; Doe One Thousand and One to One Thousand Two Hundred and Fifty (inclusive as to all intervening numbers as though each said Doe was severally and separately designated), individually and (each of them) as members of said last named association; Screen Set Designers, Illustrators & Decorators Local No. 1421, Affiliated With the International Brotherhood of Painters, Decorators and Paperhangers of America, an unincorporated voluntary association; Edward Gilbert, individually and as business agent of said last named association; Roe Eleven and Roe Twelve, individually and as President and Secretary respectively of said last named association; Doe One Thousand Two Hundred Fifty One to One Thousand Five Hundred (inclusive as to all intervening numbers as though each said Doe was severally and separately designated), individually and (each of them) as members of said last named association; Screen Cartoonists Guild, Local No. 852, an unincorporated voluntary association; Morris Howard, individually and as business agent of said last named association; Roe Thirteen and Roe Fourteen, individually and as President and Secretary respectively of said last named association; Doe One Thousand Five Hundred and One to Doe One Thousand Seven Hundred and Fifty (inclusive as to all intervening numbers as though each said Doe was severally and separately designated), individually and (each of them) as members of said last named association; Conference of Studio Unions, an unincorporated voluntary association; Herbert K. Sorrell, individually and as President of said last named association; Black Union One to Black Union Twenty (inclusive as to all intervening numbers as

though each said Black Union was severally and separately designated), each an unincorporated voluntary association; Mark One to Mark Twenty (inclusive as to all intervening numbers as though each said Mark was severally and separately designated), individually and as the respective business agents of said last named associations; Roe Nineteen to Roe Thirty-eight (inclusive as to all intervening numbers as though each said Roe was severally and separately designated), individually and as the respective Presidents of said last named associations; Roe Thirty-nine to Roe Forty-eight (inclusive as to all intervening numbers as though each said Roe was severally and separately designated), individually and as the respective Secretaries of said last named associations; Doe Two Thousand Two Hundred and Fifty-one to Doe Two Thousand Five Hundred; Doe Two Thousand Five Hundred and One to Doe Two Thousand Seven Hundred and Fifty; Doe Two Thousand Seven Hundred Fifty One to Doe Three Thousand; Doe Three Thousand and One to Doe Three Thousand Two Hundred and Fifty; Doe Three Thousand Two Hundred Fifty-one to Doe Three Thousand Five Hundred; Doe Three Thousand Five Hundred and One to Doe Three Thousand Seven Hundred and Fifty; Doe Three Thousand Seven Hundred Fifty-one to Doe Four Thousand; Doe Four Thousand and One to Doe Four Thousand Two Hundred and Fifty; Doe Four Thousand Two Hundred Fifty-one to Doe Four Thousand Five Hundred; Doe Four Thousand Five Hundred and one to Doe Four Thousand Seven Hundred and Fifty; Doe Four Thousand Seven Hundred Fifty-one to Doe Five Thousand; Doe Five Thousand and One to Five Thousand Two Hundred and Fifty; Doe Five Thousand Two Hundred and Fifty-one to Doe Five Thousand Five Hundred; Doe Five Thousand Five Hundred and One to Doe Five Thousand Seven Hundred and Fifty; Doe Five Thousand Seven Hundred and Fifty-one to Doe Six Thousand; Doe Six Thousand and One to Doe Six Thousand Two Hundred and Fifty; Doe Six Thousand Two Hundred and Fifty-one to Doe Six Thousand Five Hundred; Doe Six Thousand Five Hundred and One to Doe Seven Thousand; Doe Seven Thousand and One to Doe Seven Thousand Two Hundred and Fifty; Doe Seven Thousand Two Hundred Fifty-one

to Doe Seven Thousand Five Hundred (inclusive as to all intervening numbers as though each said Doe was severally and separately designated), individually, and (each of them) as members respectively (in groups) of said last named associations; Moe One to Moe One Thousand (inclusive as to all intervening numbers as though each said Moe was severally and separately designated), individually and (each of them) as members of said last named association; Defendants. No. 520180.

ORDER TO SHOW CAUSE, AND TEMPORARY RESTRAINING ORDER

It Is Hereby Ordered that the defendants herein, and each of them, be and appear before the above entitled court in the courtroom of Department 34 thereof, on the 18th day of October 1946, at the hour of 9:30 o'clock A. M. of said day, then and there to show cause, if any they or any of them may have, why an order should not be made and entered herein by which they, and each of them, their agents, employees, representatives, organizers, attorneys and servants, and the officers and members of defendant associations and persons acting in concert with them, or any of them, shall be enjoined and restrained and commanded to desist and refrain, pending final determination of this action, from doing or attempting to do or causing to be done, directly or indirectly, by any means, method or device whatsoever any or all of the following acts.

1. Stationing or placing or maintaining on the street, sidewalk or elsewhere, at or near plaintiff's places of business, any picket or pickets or member or members of defendant associations, or any of them, or other person or persons, for the purpose or with the intent of intimidating, threatening, molesting or coercing plaintiff or any of its present or future employees or customers or tenants or the employees of or persons intending to become employees of plaintiff's customers or tenants; or any person or persons dealing with or delivering things to or intending to deal with or deliver things to plaintiff or plaintiff's customers or tenants, or any of them.

2. Stationing or placing or maintaining on the street, sidewalk or elsewhere, at or near plaintiff's places of business, any picket or pickets or member or members of defendant association, or any of them, or other person or persons, for the purpose or with the intent of intimidating or coercing any person or persons from entering plaintiff's place of business.

3. Applying any vile names or words of ridicule, abuse or contempt or words intended, designated or calculated or apt to excite fear to plaintiff or any of such employees, customers or tenants or employees of customers or tenants or persons dealing with or delivering things to plaintiff or its customers or tenants for the purpose or with the intention of intimidation, threat, molestation or coercion.

4. Obstructing plaintiff or its employees, customers or tenants, or other persons, from ingress and egress into and out of plaintiff's places of business by walking, marching or standing in groups or in any other manner.

5. Standing, marching or walking in groups or columns before or across the ordinary places of ingress to and egress from plaintiff's places of business in such manner as not to leave between adjacent elements of such groups or columns ample space for the passage of persons or of vehicles seeking access to or from plaintiff's place of business; which space shall be not less than twenty-five feet (25′) in the case of places of ingress and egress customarily used for vehicular traffic and fifteen feet (15′) in the case of places of ingress and egress customarily used solely for pedestrian traffic.

6. Cursing at, swearing at, shouting at, yelling at or making vile, opprobrious, insulting, obscene or abusive remarks to employees, customers or tenants of plaintiff, or employees of plaintiff's customers or tenants, or other persons seeking to enter or leave plaintiff's place of business, for the purpose or with the intent of intimidating, threatening, coercing, harassing or molesting such persons or any of them.

7. Yelling or shouting in a loud or boisterous manner or making loud or unusual noises or using any devices for the megnification of sound, including devices customarily known as "loud Speakers," in the vicinity of plaintiff's place of business with the intention or for the purpose or with the effect of disturbing the peace or quiet of the neighborhood of plaintiff's place of business; or for the purpose or with the intent of intimidating, threatening, coercing, harassing or molesting persons in or upon or entering or leaving said place of business; or for the purpose or with the intent or with the effect of interfering with the conduct of the business of plaintiff or the business of plaintiff's customers or tenants, or their or any of their employees, in the production or preparation for production of motion pictures.

8. Stationing or placing or maintaining on the street, sidewalk or elsewhere, at or within two hundred (200) yards of plaintiff's places of business, or any of them, any picket or pickets.

9. Stationing or placing or maintaining on the street, sidewalk or elsewhere, at or within two hundred (200) yards of plaintiff's places of business, or any of them, any member or members of defendant associations, or any of them, or any other persons, to act as pickets, or to make known by any sign, insignia, oral or written communication or device, or in any other manner, that they are at such place as pickets or in their capacity as members of defendant associations, or any of them, or in connection with any strike against plaintiff by any of defendant associations, or in connection with any labor dispute between plaintiff and any of defendant associations.

10. Standing or marching or loitering at or in front of or within two hundred (200) yards of plaintiff's said places of business, or any of them.

Or in the alternative, if the prayers of subparagraphs 8, 9 and 10, or any of them, be denied, then in lieu thereof:

11. Stationing or placing or maintaining more than twenty-five (25) pickets or members of defendant associations or any of them, or other persons, in the aggregate

at any one time in front of or at or in the immediate vicinity of, or within two hundred (200) feet of plaintiff's place of business lying between Gower Street and Beachwood Drive, and southerly of Sunset Boulevard; or more than eight (8) of such pickets, members or persons in front of or within twenty-five (25) feet of the main studio entrance at 1438 North Gower Street and the truck loading entrance immediately northerly thereof, or either of them; or more than eight (8) of such pickets, members or persons in front of or within twenty-five (25) feet of the auto entrance at 1339 North Beachwood; or more than four (4) of such pickets, members or persons in front of or within twenty-five (25) feet of the pedestrian entrance to said place of business at 1401 North Beachwood; or more than two (2) of such pickets, members or persons in front of or within twenty-five (25) feet of the property room door at 1431 North Beachwood; or more than eight (8) of such pickets, members or persons in the aggregate, in front of any or all of the offices of plaintiff on the easterly side of Beachwood Drive; or more than four (4) of such pickets, members or persons in front of or within twenty-five (25) feet of the entrance to the Writers Building at 1300-1306 North Gower; or more than six (6) of such pickets, members or persons in front of or within twenty-five (25) feet of the entrance to the Columbia-Darmour Studio at 5823 Santa Monica Boulevard; or more than six (6) of such pickets, members or persons in front of or within twenty-five (25) feet of the property giving access to the drive-in gate near the corner of Santa Monica Boulevard and Van Ness Avenue; or more than eight (8) of such members, pickets or persons at or in front of or within two hundred (200) feet of the Talisman-Sunset Studio of plaintiff at 1422 Lyman Place; or more than four (4) of such pickets, members or persons at or in front of or in the vicinity of plaintiff's publicity office at 6048 Sunset Boulevard; or more than twenty-five (25) of such pickets, members or persons in the aggregate at any one time in front of or at or in the immediate vicinity of, or within two hundred (200) feet of plaintiff's ranch in the City of Burbank; or more than eight (8) of such pickets, members or persons in front of or within twenty-five (25) feet of the main ranch

gate at 3701 Oak Street, Burbank; or more than eight (8) of such pickets, members or persons in front of or within twenty-five (25) feet of the entrance to plaintiff's ranch on Pass Avenue, approximately 300 feet North of Oak Street; or more than eight (8) of such pickets, members or persons at any one time within fifty (50) feet of any given point in the vicinity of any of plaintiff's places of business.

It Is Further Ordered that pending the hearing of said application for preliminary injunction the defendants, and each of them, their agents, employees, representatives, organizers, attorneys and servants, and the officers and members of defendant associations and persons acting in concert with them, or any of them, are and each of them is hereby restrained and enjoined and commanded to cease, desist and refrain from doing or attempting to do or causing to be done, directly or indirectly, by any means, method or device whatsoever, any or all of the acts described in paragraphs 1, 2, 3, 4, 5, 6, 7 and 11 hereof.

Dated this 9th day of October, 1946.

WILLIS,
Judge.

(7344)

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IN THE

Supreme Court of the United States

October Term 1948

No. 111

GUSTANES ANCKER, ROYAL W. ARMSTRONG, FRED M. BARTLETT, *et al.*,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

Brief of Respondents in Opposition to the Granting of Writ of Certiorari.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Statement of the Case.

We are not unmindful of the fact that not only arguments but statements of facts involved in a case before this court should be as brief as possible without sacrificing lucidity to space. The facts in any case must, however, determine the principles of law applicable to such case. In no field of the law is this more true than in the application of the principles concerning the First Amendment as incorporated in the provisions of the Fourteenth Amend-

ment. While the application of such principles may be thought to differ during the decades, or may appear at first glance to differ, we find the underlying principle the same as it was when the respective amendments were added to the Constitution. The First Amendment was designed for protection, and not for aggression; for internal peace and not for discord; for equal rights to all and not for the protection, or as an exception, of particular classes.

By reason of the facts above stated, and also by reason of the fact that failure of the petitioners to incorporate in their petition a brief setting forth at least a résumé of the record, it becomes necessary for the respondents to set forth in considerable detail particulars of the case as shown by the record in order not only to render some assistance to this court in determining the merits of petitioners' contentions, but also to show by the record that the plea of free speech in this case is but a curtain drawn across the trail of law enforcement in an effort to divert attention from their attempt to do, by a show of force, that which could have been accomplished within the outline of peaceful procedure by lawful means, with due consideration and respect for the rights of others, as was the true goal sought by the authors of the First Amendment.

The case at bar arose out of disputes between various unions as to jurisdiction over certain employees and between various unions and motion picture companies. The merits of the disputes were not entered into in the trial court and are immaterial for consideration by this court in passing upon the questions raised by petitioners.

On October 9, 1946, Columbia Pictures Corporation secured a temporary restraining order and order to show cause [certified copy People's Exhibit "L," R. 213]. Paragraphs 1, 2, 4, 5 and 11 of the restraining order formed the basis for the violations charged in Count II, and provided generally, in part, that certain named persons, unions and their agents, attorneys and persons acting in concert with them, were restrained from having more than 25 pickets within 200 feet of Columbia Pictures Corporation's place of business, or more than 8 pickets within 25 feet of the main studio entrance at 1438 North Gower Street, Los Angeles, and that said pickets should be not less than 15 feet apart at pedestrian entrances or 25 feet apart at vehicular entrances, and that there should be no intimidation or coercion of persons desiring to enter said studios, or blocking of said entrances.

The certified copy of the temporary restraining order was admitted in evidence without objection by the defendants as to its validity [R. 213, 223], or the making of any offer of proof to show its invalidity.

The order to show cause was made returnable on October 18, 1946, and on that date the law firm of Pestana and Esterman, by Frank Pestana, appeared for the defendants therein and the hearing was continued to October 25, 1946. On that date Mr. Pestana appeared for defendants therein and the hearing was again continued to November 7, 1946. On November 7, 1946, both Mr. Pestana and Mr. Esterman appeared and the hearing was again continued to November 19, 1946. Before that date the

defendants were to serve and file affidavits in opposition to the granting of a preliminary injunction; the restraining order to remain in force [certified copies of the minute orders for said continuances are People's Exhibit "N," R. 270].

On October 10, 1946, a Deputy Sheriff of Los Angeles County served numerous copies of said temporary restraining order and order to show cause upon members of a large picket line at Columbia Studios, and read said orders over a public address system to the pickets [R. 165; People's Exhibit "G," R. 168, 234; People's Exhibit "H," R. 171; People's Exhibit "I," R. 172, 236]. No arrests were made at that time.

On October 14, 1946, the orders were again read over a public address system [R. 163, 225] to a mass picket line in front of said Columbia Studios [photograph of said picket line is shown in People's Exhibit "F," R. 164]. Three dispersal orders (unlawful assembly) were also read. Again on October 26, 1946, the temporary restraining order and dispersal orders were read to similar mass picket lines [R. 162, 225]. People's Exhibit "E" represents a scene on October 26, 1946 [R. 163, 766, 767]. Numerous arrests were made on both October 14th and October 26th.

On November 15, 1946, between 1500 and 2000 pickets [R. 157, 208] were massed in front of the Columbia Studios, as shown by People's Exhibits "C" [R. 158] and "D" [R. 160]. The temporary restraining order and dispersal orders were again read over a public address system

[R. 157, 221, 222], and many arrests were made [R. 761]. Much newspaper publicity was given to said court order and the arrests for its violation. (Copies of such newspapers are Defendants' Exhibit "1" [R. 713]; People's Exhibit "Q" [R. 314].) As testified to by defendants, the existence of said court order was common knowledge [R. 760-770, 866-869]. Radio publicity was also given said court order and the number of arrests which had been made [R. 857, 863].

On November 16, 1946, the date upon which petitioners were arrested, at about 6:20 A. M., there were six or eight pickets in front of Columbia Studios [R. 145], and at about 6:15 or 6:20 A. M. a large number of pickets, who had congregated across the street from the studios, joined these six or eight pickets [R. 145, 147], and at 6:25 A. M. there were over 200 pickets in front of said studios [R. 148]. As people tried to enter the studios the mass pickets attempted to block their passage and the police had to escort these people through the mass picket line [R. 149]. People's Exhibits "A" [R. 154] and "B" [R. 156] show the picket line as it existed at this time. At about 6:40 A. M. [R. 211] a Los Angeles police officer read the temporary restraining order over a public address system [R. 212, 213, 250], and completed reading it at 6:57 A. M. At 6:58 A. M. said police officer read a dispersal order; at 7 A. M. a second dispersal order, and at 7:02 A. M. a third dispersal order was read [R. 250, 251].

Said public address system is described on page 183 of the Record, and it was testified that the reception was clear and the broadcast could be heard and understood [R. 184].

During the reading of the orders, 70 or 80 pickets left the picket line [R. 152, 154]. People's Exhibit "K" [R. 175, 177, 287] shows the number in the picket line shortly after the last order to disperse was read. Between the time the officer started reading the court order and the last dispersal order, no one joined the picket line [R. 152]. Those who remained, to wit, 125, were arrested. Among those arrested was Frank Pestana [R. 289, 290, 291, 369-375, 931], the aforementioned attorney who had appeared in court on said order to show cause *re* preliminary injunction and who was one of the attorneys in the trial of the case at bar [R. 129, 368, 937]. All of the 125 persons arrested were named in one complaint [R. 1-10]. A number were separated and their cases continued because they were defendants in other "strike cases on trial" [R. 931, 935]. On defendants' motion the remaining defendants were severed for trial into smaller groups [R. 935], petitioners being the 35 defendants whose cases reached the jury in one of these groups.

The complaint was filed November 18, 1946 [R. 929]. Defendants first appeared November 20, 1946 [R. 930]. From that date to February 10, 1947, various motions were made by defendants. On February 10, 1947, the selection of the jury was started [R. 939]. From February 10, 1947 [R. 938], to March 10, 1947 [R. 964], a total of 20 court days were used in selecting the jury. The defense exercised 50 peremptory challenges to the jury before accepting the jury [R. 938-949], for the first time on February 24, 1947. On March 10, 1947, the jury

was finally accepted. The defense exercise a total of 131 challenges, accepting the jury only ten times. During this period the prosecution accepted the jury 88 times [R. 938-964], accepting the jury 18 consecutive times before exercising the first peremptory challenge [R. 944], and used a total of 44 challenges.

On March 11, 1947, three alternate jurors were chosen and the case was recessed (at whose request the record does not show) until March 17, 1947, when evidence was first taken [R. 143, 965], and the prosecution completed its presentation of evidence on March 25, 1947 [R. 657, 689], a total of less than seven court days. The case was then recessed until March 27, 1947 [R. 689] (again the record does not show at whose request), at which time defendants presented evidence [R. 691], finishing before noon on March 31, 1947 [R. 880, 894, 971], or two and one-half days for the presentation of the evidence for the defense, making a total of nine and one-half days for the presentation of evidence for the entire case.

The jury found all defendants, except Emil Freed and James A. Kane, guilty of Count I; all defendants guilty of Count II, and Emil Freed also guilty of Counts III and IV, acquitting all other defendants on Counts III and IV.

The Appellate Department of the Superior Court, County of Los Angeles, State of California, reversed the convictions on Count I as to all defendants. The convictions on Count II were affirmed, except as to Jack Brooks, Sheldon Kelsey and Henry Klette, which convictions were reversed, with direction to the lower court to rearraign said defendants for sentence. The conviction against Emil Freed on Counts III and IV was affirmed [R. 120].

Summary of the Argument.

I.

PRESUMPTIONS CREATED BY A STATE STATUTE CONSTITUTE RULES OF EVIDENCE APPLICABLE TO CASES BEFORE THIS COURT.

II.

THE PROVISIONS OF THE TEMPORARY RESTRAINING ORDER ARE NOT INDEFINITE OR UNCERTAIN.

III.

THE JUDGMENT IS NOT INVALID AS A GENERAL VERDICT.

IV.

THERE IS NO DENIAL OF DUE PROCESS IN JOINT TRIALS.

V.

THE DEFENDANTS SUFFERED NO PREJUDICE BY REASON OF THE LENGTH OF THE TRIAL.

VI.

THE RECORD AFFIRMATIVELY SHOWS THAT THE DEFENDANTS SUFFERED NO DENIAL OF DUE PROCESS.

VII.

CONCLUSION.

ARGUMENT.

I.

Presumptions Created by a State Statute Constitute Rules of Evidence Applicable to Cases Before This Court.

In their Statement as to Jurisdiction (Petition, p. 6, subpar. A), the petitioners appear to rely upon the failure of the People to show that acts were committed or conditions created which justified the Superior Court of the State in issuing the temporary restraining order, the violation of which resulted in the conviction and judgment concerning which the petitioners complain. They correctly point out that the Appellate Department of the Superior Court held that there was a presumption of the existence of a factual condition which justified the issuance of the order in question.

Although the question of whether there was factual basis for the order does not appear to be within the ambit of any of the various "Questions Presented" (Petition, p. 9), it is felt by your respondents that a discussion of this matter is required as a factual basis for discussion of some of the questions presented.

Section 1963 of the California Code of Civil Procedure provides as follows:

> "Disputable Presumptions.—All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:
>
> * * * * * * * *
>
> 16. That a court or judge, acting as such, whether in this state or any other state or county, was acting in the lawful exercise of his jurisdiction."

To orders of a court, the same presumptions, as to regularity of procedure pertaining to judgments or other judicial acts, apply.

Cox v. Power (Tyrone) Enterprises, Inc., 49 Cal. App. 2d 383, 401 (concurring opinion).

Presumptions (created by California Code of Civil Procedure, Section 1963), while disputable, are in themselves evidence.

Mispah Inv. Co. v. Los Angeles, 215 Cal. 368, 372;
Immel v. Dowd, 6 Cal. App. 2d 145, 146.

Such presumptions are in themselves evidence which will support a judgment, unless rebutted,

Braun v. Brown, 14 Cal. 2d 346, 351.

The laws of the various states with respect to evidence are applicable to federal courts except when in conflict with the Constitution, treaties or federal statutes (28 U. S. C. A. 725).

The application of the highest court of a state of its local laws, and the facts on which it founded its judgment, is controlling upon the United States Supreme Court.

General Trading Co. v. State Tax Comm. of Iowa, 322 U. S. 335, 337.

Decisions of the highest court of the state on matters of state law are generally conclusive upon the United States Supreme Court.

Huddleson v. Dwyer, 322 U. S. 232, 236;
Neblett v. Carpenter, 305 U. S. 297, 302.

If the defendants in this case had seen fit, they could have introduced into evidence in the trial court, for the purpose of challenging the validity of the temporary restraining order, the complaint in the Superior Court issuing said restraining order, together with any and all affidavits considered by said court in support of the application for a temporary restraining order.

The granting of temporary restraining orders is governed by Section 527 of the California Code of Civil Procedure. For the convenience of this court said section is printed herein as Appendix A. Attention is directed to the provisions therein which provide that the party obtaining said order must be ready to proceed when the matter first comes on for hearing and that a continuance can only be granted upon the defendant's request therefor.

The presumption that courts act within their jurisdiction created a *prima facie* showing on the part of the People that sufficient facts existed to justify the order of the Superior Court. The burden then shifted to the defendants to overcome such *prima facie* proof. Evidence wilfully suppressed is presumed to be adverse (California Code of Civil Procedure, Sec. 1963-5). In view of the fact that the original complaint and affidavits were on file in the Superior Court and were available to the defendants for the purpose of showing the contents thereof, it must be presumed in this court that if such complaint and affidavits had not supported the order, the defendants would have made them part of the record in the case at bar.

It may be further assumed that, if the defendants felt that the restraining order issued by the Superior Court was improper or too drastic in its provisions, they would not have consented to such order remaining in effect, but would have taken proper action in the Superior Court to have the same modified as provided in Section 527 of the Code of Civil Procedure. The proper method of attack would have been to move the Superior Court for the modifying or vacating of such temporary restraining order, rather than to pass upon the legality of its terms and make no attempt to judicially correct, alter or remove any or all of the restraints placed upon defendants' activities.

In *U. S. v. United Mine Workers etc.*, 330 U. S. 258, 293, this court stated:

> "We find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceeding."
>
> * * * * * * * *
>
> "It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."

The above cited case is complete authority for the sustaining of the action of the trial court in the case at bar.

Although there can be no contempt for violation of an order which is void in its inception, such rule does not apply to an order of a court acting within its jurisdiction which is faced with the necessity of evaluating facts and exercising such jurisdiction in a discretionary manner according to the factual situation, which, from the proof, the court finds to exist. In short, there is a presumption that the facts presented to the Superior Court justified the issuance of the temporary restraining order. If, as construed by the petitioners, a portion of such order prohibits acts which are within the field of peaceful picketing, it must be presumed that the facts before the issuing court were sufficient to justify the prohibition until such time as it was shown that there was a change in conditions. (See, *Milkwagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287.) However, we do not admit that the restraining order, in its entirety or the portions set out in the criminal complaint [R. 1, 5], is subject to such construction. The order, like statutes, must be read in its entirety to ascertain its intent. The fact that the court specifically allowed picketing under certain conditions discloses an intent to permit reasonable peaceful picketing within the limits warranted by the facts before said issuing court.

II.

The Provisions of the Temporary Restraining Order Are Not Indefinite or Uncertain.

The petitioners attack the provisions of the temporary restraining order upon various grounds. In point I of our argument we have shown that, within the rule laid down by this court in *Milkwagon Drivers Union v. Meadowmoor Dairies,* 312 U. S. 287, the order was made within the jurdiction of the issuing court. Another ground, at least impliedly urged by petitioners, is that, by its terms the order was so contradictory as to be uncertain, and for that reason invalid. This attack is leveled at paragraphs 5 and 11, set out in the criminal complaint [R. 6].

Briefly stated, paragraph 5, requires that pickets standing, marching or walking before or across entrances to Columbia Studios, leave between adjacent elements certain distances. The word "elements" connotes the possibility that two or more persons may elect to stand or walk together in close formation. However, whether singly or in groups, the order required that between single pickets (not members of a group in close formation) or groups, sufficient space should be provided to enable pedestrians or vehicles to enter or leave the premises without coming in conflict with the pickets.

To a certain extent paragraphs 5 and 11 complement each other. Paragraph 11 allows as many as 25 persons within 200 feet of the place of business of Columbia Studios between Gower Street and Beachwood Drive, provided,

however, that of this number of 25 no more than eight shall be stationed within 25 feet of certain entrances. This paragraph does not state how such eight persons shall stand or march. It is readily apparent that, if allowed to stand relatively close together immediately in front of such entrances or gates, it would be possible for the pickets to form in a position to hinder the free passage of persons or vehicles through the entrances or gates described and shown in People's Exhibit "U" [R. 683].

We must presume that the facts laid before the court issuing the temporary restraining order justified its conclusion that the systematic behavior of the pickets had been such as to induce in the minds of persons wishing to enter or leave through such gates a fear of physical violence if they passed or undertook to pass through a closely formed picket line. The court therefore incorporated in its order, as paragraph 5, a provision which would require that pickets at the gates must leave reasonable room for the entrance or exit of pedestrians and vehicles. It is worthy of note that, under the provisions of the order, after allowing for eight pickets at each gate, that is to say, eight persons within 25 feet of the gates, there remained nine persons who could stand or walk 15 feet or more apart in a semi-circle with its imaginary diameter parallel with and across the gates, with an axis of 25 feet, thereby affording ample opportunity to publicize the fact of, and the facts concerning, such labor difficulty.

Nothing in the provisisions of either paragraph 5 or 11 prohibited persons in anany number in excess of 25 from holding a meeting, as lonong as they kept 200 feet from the premises of Columbia S Studios. That the provisions of the order concerning thehe number of pickets at the gates was understood by those se in charge and control of the conduct of pickets, amply appears by the testimony of defense witness Picket Captain J Kane [R. 761, fol. 1560, to 762, fol. 1562].

Defense witness Jones es testified that the purpose of the picket lines was to keepep scabs out and close the studios down [R. 868, fol. 173535], and that such was his reason for joining the larger r picket line [R. 869, fols. 1735-1737].

The Appellate Departrtment of the Superior Court specifically found that paragagraph 11 of the restraining order was a valid exercise ofof the police power [R. 113, fol. 484], but nowhere in ththe opinion did the court hold that the other provisions of f the order were invalid. The Appellate Court further fofound that the evidence justified the conclusion that each ofof the defendants knew there was an order in existence l limiting the number of pickets to a figure much less thahan the number on the picket line on November 16th [R.]. 116, fols. 488-489]. It is true that such court mentioned ththat some portions of the order were conflicting. However, , we have herein pointed out that the provisions incorporarated in the criminal complaint were not conflicting. Assumming, for the purpose of argument only, that some other p portions of the order were conflicting, it does not follolow that sections which were clear in their meaning were re tainted by such alleged inconsistency.

III.

The Judgment Is Not Invalid as a General Verdict.

The petitioners, after urging the invalidity of certain portions of the temporary restraining order, urge the possibility that the jury might have found them guilty of violation of a void provision, and argue that, because there was a general verdict only, this possibility requires that the judgment be reversed. In support of such contention they depend upon *Stromberg v. California,* 283 U. S. 359.

Petitioners do not, nor can they, urge that Section 166 of the California Penal Code is not a valid statute. They avoid any argument as to the sufficiency of the evidence in that regard. The jury returned a verdict of guilty as to Count II, which required them to find that the defendants did wilfully and unlawfuly disobey a lawfully issued order of a court. The evidence showed that an order of a court had been issued, to-wit, the temporary restraining order; it showed that the provisions in part permitted a limited number of pickets to peacefully inform the public of the nature of their dispute; it showed that a great number of persons, far in excess of the number limited by the Superior Court, were present at the scene of activity, and that the intent of these persons was to wilfully disobey said court order. This was a question of fact and was affirmed on appeal by the Appellate Department of the Superior Court, the court of last resort in such case.

The decision rendered by the Appellate Department of the Superior Court stated, in reference to the provisions of the restraining order:

> "The evidence justifies, indeed requires, that each defendant knew that there was an order in existence

and that among its varied and, in part, conflicting provisions, there were some limiting the number of pickets to a figure much less than the number in operation."

The court did not directly say that the provisions for which these petitioners were convicted are so vague and uncertain that a conviction therefor could not be sustained. The reference to the vague and conflicting provisions could well be to those provisions other than the ones forming the basis of the conviction of the petitioners, due to the length and detail of the restraining order. The court expressly found paragraph 11 of said order to be valid, holding it not necessary to determine the validity of the remaining provisions thereof.

The jury was instructed that, in order to find the defendants guilty upon a complaint (count) charging the doing of two or more acts, the doing of any one of which constitutes an offense, it must agree that the defendants did at least one of such acts [R. 56, fol. 101].

This instruction has been held to be required in such cases.

People v. Scofield, 203 Cal. 703.

The *Stromberg* case, *supra* (*Stromberg v. California,* 283 U. S. 359), was decided upon the construction placed upon the statute by the State court. Such court concluded that the words "organized government," as used in the statute, included opposition to the method whereby a government conducted by one political party in conformance with the method of government approved by the people, or, in other words, opposition by members of, shall we say, the Prohibition party, to the method whereby the

Democratic or Republican Party transacted the business of government even though conducted according to all the forms and requirements of the Constitution. Although we find ourselves unable to see how the State court placed such interpretation upon the statute, we nevertheless concede that this court was required to accept the interpretation placed upon the statute by the California court.

In the case at bar we do not find any interpretation of the order of the Superior Court which would require this court to say that, under the interpretation placed upon the order by the State court, some portion of the temporary restraining order is void.

In the *Stromberg* case it appears from the statement of the court that the prosecution urged to the jury that they could convict if they found the defendant violated the first clause of the statute alone. In the case at bar all the emphasis of the prosecution was placed upon the fact that a crowd of pickets, variously estimated as exceeding 200 in number, converged upon the street in violation of the provisions of the paragraphs of the restraining order limiting the number of pickets (paragraphs 5 and 11 of the restraining order). In the *Stromberg* case, this court, accepting the construction of the statute by the state court and taking into consideration the emphasis of the prosecution upon the first clause of the statute, held that such first clause constituted a limitation upon the right to free expression of opinion in a peaceable manner. The record in such case is utterly devoid of any evidence of violence or threat of violence. The petitioners in the case at bar attempt to urge that they were deprived of the right of free speech.

Freedom of expression of thought upon political, religious and social ideas is the cornerstone of democracy, and our forbears who suffered by reason of attempted suppression of ideas, never intended, by the adoption of the First Amendment, to sacrifice public peace and good order as a burnt offering on the altar of Freedom of Speech. Neither did the people, in adopting the Due Process Clause of the Fourteenth Amendment, intend that it should be a sword in the hands of an organization bent upon flouting the orderly administration of the law. The record in this case, unlike the record in the *Stromberg* case, shows a planned display of force intended not only to intimidate by a show of force, but also to show contempt for our courts, which, in the final analysis, must be the protectors of the rights of free speech and the preservors of peace and good order in organized government.

Although we have no doubts concerning the validity of each paragraph of the temporary restraining order set out in the criminal complaint, but also of the temporary restraining order in its entirety, we feel that, even though this court may differ with us in this respect, the record is such that, admitting the possibility of unanimous agreement upon violation of provisions, there can be no question that the jury must have agreed upon the fact that paragraphs 5 and 11 of the restraining order were violated.

This case again differs from the *Stromberg* case, in that in such case the record supported a conclusion that there was a strong probability that the jury agreed that there

was a violation of the first clause of the statute, and did not agree upon a violation of either of the other two clauses. There is nothing in the decision in that case indicating that, if the record would have impelled a conclusion that the jury must have agreed there was a violation of a valid clause of the statute, the fact that the jury might also have agreed upon a violation of an invalid clause would invalidate the judgment.

In other words, where it appears that the jury convicts of violation of a valid provision of law, the fact also of a finding of guilt of an invalid portion thereof does not render the valid conviction ineffective.

It has been held by the Supreme Court of the State of California that if a complaint sets forth facts which state a public offense under the statute and a conviction is had thereunder, the burden is upon the one convicted to prove that the said conviction was not based upon a valid section of the statute.

In re Bell, 19 Cal. 2d 488.

A verdict on the evidence is all an accused can claim; he is not entitled to a setup that will give him a chance of escape after he is properly proven guilty. Society also has a right to a fair trial.

Fay v. New York, 332 U. S. 261.

It would follow, therefore, that petitioners herein must sustain the burden and prove conclusively that the jury did not convict them for violating the provisions of the restraining order found to be valid by the court of last resort. This, we submit, petitioners have failed to do.

IV.

There Is No Denial of Due Process in Joint Trials.

Petitioners urge that the joint trial which resulted in their conviction was a denial of due process of law. Section 1098 of the California Penal Code provides as follows:

> *"Trial of defendants jointly charged with crime: Joint and separate trials: Challenges.* When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant. If the defendants are tried jointly, the state and the defendants shall be entitled to the number of challenges prescribed by section 1070 of this code, which challenges on the part of the defendants must be exercised jointly. Each defendant shall also be entitled to five additional challenges which may be exercised separately; the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants."

In the case cited by petitioners, *Kotteakos v. U. S.*, 328 U. S. 750 at 773, this court stated:

> "There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some.

When many conspire, they invite mass trial by their conduct."

The facts of the case at bar, as set forth herein, clearly show that by reason of the number of persons present and the manner of their concerted action, they invited such a joint trial.

Under the decisions of the courts of California, it has been settled that all persons jointly charged with crime may be jointly named in a single complaint and that the matter of a separate trial for each defendant so charged is a matter resting within the sound discretion of the trial court.

People v. Baa, 24 Cal. 2d 374;
People v. King, 30 Cal. App. 2d 185;
People v. Wilson, 46 Cal. App. 2d 218.

The refusal of the trial court to grant a motion for severance is a valid exercise of judicial discretion, and, when it is not shown that such discretion has been abused, it is not reviewable on appeal.

Soblowski v. U. S., 271 Fed. 294, certiorari denied, 256 U. S. 697;
Olmstead v. U. S., 19 F. 2d 842, certiorari denied, 275 U. S. 557;
Ginsberg v. U. S., 96 F. 2d 433.

Where accused are jointly charged with crime, a separate trial is not a matter of right.

People v. Eudy, 12 Cal. 2d 41.

The following are some of the cases wherein joint trials were held to be proper:

(Trial of 75 defendants):

Allen v. U. S., 4 F. 2d 688 (cert. den. 267 U. S. 597-598).

(Trial of 53 defendants):

People v. Heidt, 20 N. W. 2d 751, 312 Mich. 629.

(Trial of 53 defendants):

U. S. v. Gilbert, 31 Fed. Supp. 195.

In the last cited case the court pointed out that the rights of each defendant can be carefully guarded by the trial judge in the charge to the jury, and that there would be no disadvantage to the respective defendants.

In the case at bar, the attorneys for the Union involved in the dispute represented the petitioners at all stages of the proceedings and not one of said petitioners did at any time seek to appoint, substitute or associate any other counsel. It must be presumed that each of said petitioners was at all times satisfied with the services of their attorneys, and contented to be represented by them, except those petitioners who represented themselves during the trial. The record does not anywhere show an abuse or deprivation of the right of any petitioner to consult or advise with counsel, or show that any petitioner who desired to present evidence in his behalf was denied or deprived of such right. Petitioners' contention in this regard would appear now to be a matter of being dissatisfied with the result of the trial and of the advice and services rendered by counsel of their own choosing.

It is also well settled that the fact that a conspiracy is not alleged in a complaint charging the crime, does not preclude proof of its existence.

People v. Holmes, 118 Cal. 444;
People v. Duran, 57 Cal. App. 2d 363.

It was one of the theories of the prosecution to show the concerted action and conspiracy of these petitioners, and on this theory that much of the evidence was presented.

It is fundamental that in a case wherein there is a joint trial, the sole question upon appeal is, were the defendants prejudiced by reason of such joint trial. There is nothing in the record which tends to indicate that prejudice to any defendant occurred.

Bearing in mind that these defendants elected to be defended by a single firm of attorneys, one member of the firm only conducting the trial at any one period of time, it becomes readily apparent that, in order to afford them a separate trial, the total time consumed would have far exceeded the time consumed in this trial and that some of the defendants would have been denied the early trial provided for by our State Constitution. On the other hand, separate trials, assuming that defendants had been willing to secure additional counsel, would have required the services of approximately 35 different divisions of the court.

Certainly there is no showing, when the reasonable interests of the People of the State are weighed in the balance against the rights of the defendants, that there was in this case any abuse of discretion by the trial court.

V.

The Defendants Suffered No Prejudice by Reason of the Length of the Trial.

Petitioners state that "Each of petitioners, instead of facing a trial of one or two days, was obliged to attend court over two months" [R. 19]. In our Statement of Facts we have shown the number of days devoted to selecting the jury and the period of time devoted to presentation of evidence.

The defendants were entitled to 10 peremptory challenges to be exercised jointly, and in addition 5 individual challenges for each separate defendant, or a total of 185 peremptory challenges for 35 defendants. The People were allowed the same number (California Penal Code, Sections 1070 and 1098).

In making the above computation we have excluded six defendants of the original 41 selected for trial, some of whom pleaded guilty and some were excused on account of sickness or other causes, whereby their cases were not submitted to the jury.

Elsewhere we have shown the period of time consumed in selection of the jury and the number of such challenges used by the People and the defendants. Manifestly, by reason of the fact that, if tried separately or in smaller groups the time required for selection of a jury would have been less by reason of a lesser number of challenges allowable. On the other hand, the greater number of challenges allowable were advantageous to the defendants in securing a jury fully satisfactory to them. We think it is a fair inference from the record that the great number of peremptory challenges used by the defendants was in keeping with the plans of the pickets when they said:

"We will fill the jails, we will fill the courts so they can't handle us" [R. 239]. The time used in taking evidence was comparatively short.

We have shown herein that under the rule of practice in California it is permissible to show by evidence the existence of a conspiracy to commit a crime, even though the offense of criminal conspiracy is not charged in the complaint. This case was tried, at least in part, upon the theory that the acts of aggression which led to the arrests were the result of the execution of a planned course of action. It thus readily appears that, even though the defendants had been tried singly or in groups of four or five, the length of time necessary for the introduction of evidence in each case would not have been substantially less than that required for the presentation of evidence against the group in its entirety.

The fact that a considerable length of time was spent in the trial is not the test of due process. The test is whether the defendants in the case were given a fair trial, free from prejudice. The petitioners have failed to sustain the burden of showing prejudice to their rights by reason of the length of such trial. The "due process of law" clause of the Fourteenth Amendment should not be so construed as to interfere with the State in its enactment and local administration of the criminal law, nor to confine it to any mode of proceedings, so long as the law as enforced by the State affords equal protection to all persons within its jurisdiction, similarly situated, and is not violative of the fundamental rights that are essential to protection of life, liberty and property.

The Fourteenth Amendment does not limit power of states to try and deal with crimes committed within their

borders, and was not intended to bring to test of decision of the United States Supreme Court every ruling made in the course of state trial.

Avery v. State of Alabama, 308 U. S. 444, 446.

VI.

The Record Affirmatively Shows That the Defendants Suffered No Denial of Due Process.

If laws enacted by a state fall within the legitimate sphere of legislative power, and are enforced in compliance with the general rules prescribed by our system of jurisprudence to secure private rights, their harshness, injustice or oppressiveness will not invalidate them as contrary to due process of law.

Missouri Pac. R. Co. v. Humes, 115 U. S. 512.

The guarantee of due process demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

Nebbia v. New York, 291 U. S. 502.

Notice and hearing together with a legally competent tribunal having jurisdiction of the case constitute basic elements of the constitutional requirement of due process.

Powell v. Alabama, 287 U. S. 45.

We have hereinbefore demonstrated by our argument that the petitioners were tried for violation of a valid legislative enactment. Their attempted distinguishment between civil and criminal contempt avails them nothing. The elements of contempt are the same. The only difference in consequences is that the statute provides a greater punishment for criminal contempt than is provided for civil contempt, and that the contemnors have the advantage

that they may be tried by a jury in a court presided over by a judge other than the one who issued the restraining order forming the basis for the action.

Likewise we have shown that the restraining order involved in this action was made well within the jurisdiction of the Superior Court. Examination of the record justifies us in reflecting that:

> "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly called the 'judicial power of the United States' would be a mere mockery."
>
> *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 450.

Not only have the petitioners failed to show where in the record they have suffered any prejudice by reason of procedure of trial, but, on the contrary, have presented a record which affirmatively shows that they have had a "fair trial" within the definitions of such term as gleaned from the opinions of this court. This is emphasized by the fact that the verdicts of the jury convicting all on one count, acquitting some and convicting others on other counts, disclosed that the jury was not prejudiced against any defendant by reason of his being tried with other defendants; that the jury weighed and considered the evidence presented as it applied to each defendant for each particular count, and that their verdict was not the result of passion or prejudice. Certainly the record affirmatively shows that the petitioners, and each of them, suffered no denial of "due process" within the meaning of such term as defined in the many decisions of this court, some of which are cited above.

VII.

Conclusion.

The evidence of this case, whether we consider it as a whole or on the testimony of the defense alone, shows that the demonstration out of which this case grew was never conceived or executed for the purpose of acquainting the public with the facts of a labor dispute. It was conceived and executed as a demonstration of the fact that, unless restrained by official action, the members of the dissatisfied unions and their friends could and would, by force, prevent all persons from entering the premises of Columbia Studios.

The time has not come in this nation, and, by the grace of God, may it never come, when force and threats of force can supersede the process of lawful discussion and settlement of grievances.

There appears in this case no reason, either in law or in good conscience, why the petition should be granted.

The People of the State of California respectfully pray that the petition be denied.

Respectfully submitted,

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APPENDIX A.

Sec. 527. *Preliminary—Procedure to Obtain.*

An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. A copy of the complaint or of the affidavits, upon which the injunction was granted, must, if not previously served, be served therewith. No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than ten days from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, will be entitled, as of course, to one continuance for a reasonable period, if he

desire it, to enable him to meet the application for the preliminary injunction. The defendant may, in response to such order to show cause, present affidavits relating to the granting of the preliminary injunction, and if such affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. On the day upon which such order is made returnable, such hearing shall take precedence of all other matters on the calendar of said day, except older matters of the same character, and matters to which special precedence may be given by law. When the cause is at issue it shall be set for trial at the earliest possible date and shall take precedence of all other cases, except older matters of the same character, and matters to which special precedence may be given by law.